STATE OF MICHIGAN

COURT OF APPEALS

SALWA G. SAYAH,

Plaintiff-Appellant,

v

SARAH JEANNE CHAM,

Defendant-Appellee.

UNPUBLISHED
December 16, 2014

No. 318120
Oakland Circuit Court
LC No. 2012-129965-NI

Before: DONOFRIO, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

In this negligence action arising from an automobile accident involving plaintiff and defendant, plaintiff appeals the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(7) and dismissing plaintiff's case with prejudice on the basis that it was barred by the statute of limitations. Because defendant did not waive the defense, we affirm.

This case arises from an automobile accident involving plaintiff and defendant that occurred on July 17, 2009, during which plaintiff allegedly suffered injuries. Pursuant to MCL 600.5805(10), the applicable limitations period was three years, which ended on July 17, 2012. On July 10, 2012, plaintiff timely filed a complaint alleging a personal-injury claim. Upon the filing of her complaint, a summons was issued as required under MCR 2.102(A), which expired on October 9, 2012, or 91 days after the date the complaint was filed. MCR 2.102(D). Plaintiff failed to effectuate service of the summons and complaint on defendant before the summons expired. Consequently, plaintiff's action was deemed dismissed, without prejudice, as required under MCR 2.102(E)(1).[1] Although plaintiff moved for alternate service, which the trial court granted on October 8, 2012, plaintiff failed to request a second summons to extend the time to serve process on defendant. Plaintiff's attorney, apparently believing that the statute of

[1] Although the trial court did not enter its order dismissing plaintiff's original complaint until February 12, 2013, the action is deemed dismissed, without prejudice, upon the expiration of the summons. A clerk's failure to enter a dismissal order does not continue an action that is deemed dismissed. MCR 2.102(E)(1) & (2).

limitations was tolled during the life of the summons in the first action, filed the instant complaint on October 15, 2012.[2]

Defendant, in her answer to plaintiff's October 2012 complaint, raised as an affirmative defense that plaintiff's claim was barred by the statute of limitations. Specifically, defendant stated that "Plaintiff did not file her lawsuit within three years of the date of loss, and accordingly, her claim is barred by Michigan law." Defendant did not reassert the defense in a dispositive motion under MCR 2.116(C)(7) until eight months after plaintiff commenced the instant cause of action and after the parties conducted discovery and prepared for case evaluation. In her response to defendant's motion, plaintiff argued that defendant waived her statute of limitations defense by actively preparing the case for litigation for eight months before asserting her defense in the dispositive motion. The trial court rejected plaintiff's argument, granted defendant's motion, and dismissed plaintiff's action with prejudice, concluding that plaintiff failed to establish that defendant waived her statute of limitations defense. This appeal ensued.

Summary disposition under MCR 2.116(C)(7) is appropriate if a "claim is barred by an applicable statute of limitations." *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). "[A]bsent disputed questions of fact, whether a cause of action is barred by a statute of limitations is a question of law that this Court . . . reviews de novo." *Attorney General ex rel Dep't of Environmental Quality v Bulk Petroleum Corp*, 276 Mich App 654, 664; 741 NW2d 857 (2007) (quotation and citation omitted).

On appeal, plaintiff does not dispute that her instant claim was filed outside of the applicable limitations period. Instead, she contends that defendant's course of conduct in actively preparing the case for litigation during the eight months after plaintiff commenced this cause of action and before she filed her dispositive motion amounts to a waiver of her statute of limitations defense. We disagree. "[A] statute of limitations defense is an affirmative defense that may be waived." *Id.* at 665. "Such a wavier may be 'shown by a course of acts and

[2] We note that the filing of plaintiff's previously dismissed complaint did not toll the statute of limitations. In order for the filing of a complaint to toll the statute of limitations, "a copy of the summons and complaint [must be] served on the defendant within the time set forth in the supreme court rules." MCL 600.5856(a). Failure to perform any actions specified by MCL 600.5856 results in the statute of limitations not being tolled, and "the period of limitations continues to run after the complaint has been filed." *Gladych v New Family Homes, Inc*, 468 Mich 594, 599; 664 NW2d 705 (2003). Because plaintiff did not effectuate service of a copy of the summons and complaint on defendant within 91 days of filing her previously dismissed complaint and a second summons was not issued allowing for an additional period of time to effectuate service, as allowed under MCR 2.102(D), plaintiff's original complaint did not operate to toll the statute of limitations. MCL 600.5856(a); *Gladych*, 468 Mich at 599. Thus, the statute of limitations for plaintiff's personal injury claim continued to run, expiring on July 17, 2012, three years after the accident, MCL 600.5805(10).

conduct, and in some cases will be implied therefrom."' *Id.*, quoting *Burton v Reed City Hosp Corp*, 471 Mich 745, 755 n 4; 691 NW2d 424 (2005).

In *Palenkas v Beaumont Hosp*, 432 Mich 527, 548; 550; 443 NW2d 354 (1989), the defendant asserted the statute of limitations as an affirmative defense but failed to include any factual allegations in its answer to support its defense, failed to raise the statute of limitations issue in a pretrial motion, failed to submit other evidence before the trial to rebut the plaintiff's allegation regarding the timing of the discovery of the defendant's malpractice, did not present evidence on the issue in its case in chief, and did not request a special verdict on the applicability of the discovery rule. Consequently, the plaintiff had no notice of any factual allegations by the defendant to support the statute of limitations defense. Instead, the defendant waited until during the trial, at the conclusion of the plaintiff's presentation of its case in chief, to move for accelerated judgment on the ground that the plaintiff's proofs failed to substantiate that the case fell within the limitations period. *Id.* at 544-545, 549-551, 566. The Supreme Court concluded that, under these circumstances, the defendant abandoned its statute of limitations defense. *Id.* at 551, 566.

In *Horvath v Delida*, 213 Mich App 620; 540 NW2d 760 (1995), like in *Palenkas*, the defendants did not assert their statute of limitations defense in a pre-trial dispositive motion, instead waiting until during the trial to assert the defense. But the *Horvath* Court, unlike the *Palenkas* Court, concluded that the defendants did not waive their statute of limitations defense. *Id.* at 629, 631. This Court distinguished *Palenkas* on the basis that the facts underlying the defendant's statute of limitations defense in *Palenkas* were in dispute, while there was no such factual dispute in *Horvath*, in light of the plaintiffs' own deposition and trial testimony exposing that their claim fell outside of the applicable limitations period. *Id.* at 629-630. Thus, the plaintiffs in *Horvath* could not have been taken by surprise by the defendants' assertion of a statute of limitations defense. Significantly, this Court stated:

> Clearly, in light of plaintiffs' deposition testimony, defendants in this case should have moved for summary disposition before trial. MCR 2.116(C)(7). Such a motion would have promoted judicial economy and avoided expensive litigation for both parties. However, defendants' failure to seek pretrial dismissal of plaintiff's cause of action does not alone warrant a conclusion that defendants abandoned their affirmative defense based on expiration of the period of limitation. [*Id.* at 630-631 (footnote and citations omitted).]

More recently, in *Bulk Petroleum*, 276 Mich App 654, the defendants failed to sufficiently plead their statute of limitations defense in their answer to the plaintiff's complaint, and instead merely asserted "Statute of Limitations" as an affirmative defense. Additionally, the defendants also failed to assert the defense in response to the plaintiff's motion for summary disposition. *Id.* at 664-665. Instead, the defendants stipulated to the entry of an order of judgment against them without ever asserting their statute of limitations defense. At a following hearing to determine if any penalties should be assessed against the defendants as a result of their admitted liability, the defendants "continued to remain silent about a statute of limitations defense." *Id.* at 666. The defendants also failed to mention their statute of limitations defense when they filed a motion to stay the penalty payment date or when they sought appellate review of the order assessing the penalty. *Id.* The defendants waited until the plaintiff moved for

additional penalties at a subsequent hearing to assert their statute of limitations defense. *Id.* This Court concluded that "by failing to raise a statute of limitations defense in response to plaintiff's motion for summary disposition and at the first hearing regarding penalties, defendants waived the defense." *Id.*

Applying these principles to the instant case, we conclude that defendant's conduct does not amount to a waiver of her statute of limitations defense. First, defendant properly raised her statute of limitations defense in her answer by listing the defense as an affirmative defense under a separate and distinct heading and including the facts constituting the defense as required under MCR 2.111(F)(2) and (3). Although defendant did not provide detailed facts to support the defense in her answer, she cited the applicable three-year limitations period governing a personal-injury claim and stated that plaintiff did not file her lawsuit within that time. This was sufficient to put plaintiff on notice that defendant might assert that her complaint was untimely filed. See *Horvath*, 213 Mich App at 630-631. In contrast, in *Bulk Petroleum*, 276 Mich App at 664-665, the defendants' answer was insufficient where they merely asserted "Statute of Limitations" as an affirmative defense and "failed to provide any facts supporting" the defense or cite an applicable statute of limitations.

Second, we further note that, like in *Horvath*, there was undisputed factual support for the statute of limitations defense in the record to prevent plaintiff from being taken by surprise by defendant's assertion of the defense. Indeed, plaintiff clearly had notice of the undisputed facts underlying the statute of limitations defense because the factual allegations of her complaint disclosed the undisputed accrual date, the date of the accident, July 17, 2009, thus, revealing the fatal defect in her claim—that her complaint, which was filed on October 15, 2012, was filed approximately three months after the three-year limitations period expired, MCL 600.5805(10). We find these facts similar to *Horvath*, where the plaintiffs' own deposition and trial testimony revealed an undisputed accrual date that fell outside of the limitations period, and thus, the plaintiffs could not have been taken by surprise by the defendants' assertion of a statute of limitations defense. *Horvath*, 213 Mich App at 628-631. In contrast, in *Palenkas*, 432 Mich at 550-551, the accrual date was factually disputed and the defendant failed to include any factual allegations in its answer to support its statute of limitations defense.

Finally, we note that defendant properly asserted her statute of limitations defense in a pre-trial dispositive motion brought under MCR 2.116(C)(7). Although this fact alone is not determinative, see *Horvath*, 213 Mich App at 630 (stating that even though a defendant should have sought dismissal under statute of limitation grounds before trial, the failure to do so was not fatal), it is significant and weighs against waiver. Likewise, in *Bulk Petroleum*, this Court stressed how timely asserting the defense is significant. See *Bulk Petroleum*, 276 Mich App at 665-666 (concluding that that the defendants waived their statute of limitations when they asserting it deep into the proceedings, despite having many opportunities to do so earlier).

Therefore, we conclude that defendant's conduct did not amount to a waiver of her statute of limitations defense. Defendant properly raised the defense as an affirmative defense in her answer and her answer was sufficient to put plaintiff on notice of the defense, there was undisputed factual support for the statute of limitations defense to prevent plaintiff from being taken by surprise by the assertion of the defense, and defendant properly asserted the defense in a pre-trial dispositive motion. These circumstances clearly distinguish this case from *Bulk*

Petroleum. We recognize that eight months elapsed between plaintiff's commencement of her action and defendant's assertion of her statute of limitations defense in her dispositive motion and that, in light of the undisputed accrual date, defendant could have brought her motion earlier, which arguably would have promoted judicial economy and avoided expensive litigation for both parties. *Horvath*, 213 Mich App at 630-631. However, as the case law demonstrates, the passage of time alone does not operate to waive an affirmative defense. *Id.* at 630.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood
/s/ Douglas B. Shapiro